

CRIMINAL RULES REPORTER

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ARTICLE I. GENERAL PROVISIONS.

Rule 1.2 Purpose and construction.

1.2.040 In interpreting a rule the Arizona Supreme Court has promulgated, the courts follow the usual principles of statutory construction.

Lopez v. Kearney, 222 Ariz. 133, 213 P.3d 282, ¶ 12 (Ct. App. 2009) (court looked at plain language of rule to interpret Rule 17.4(g)).

Rule 1.3 Computation of time.

1.3.010 In computing any period of time of more than 24 hours, the day of the act or event from which the designated period of time begins to run is not to be included, and the last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which case the period shall run until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday.

State v. Lychwick, 222 Ariz. 604, 218 P.3d 1061, ¶¶ 3–15 (Ct. App. 2009) (defendant was charged with aggravated harassment; A.R.S. § 12–1809(J) provides that injunction expires 1 year after service on person; injunction against harassment was served on defendant 1/17/06 at 11:00 a.m.; on 1/17/07 at 10:00 a.m. defendant threw package onto victim's driveway; defendant contended injunction expired at end of day on 1/16/07, thus he was not guilty; court followed usual method of computing time, which is excluding first day and including last day, and thus concluded injunction expired at end of day on 1/17/07, thus defendant committed act in question while injunction was still in effect).

State v. Tillmon, 222 Ariz. 452, 216 P.3d 1198, ¶¶ 7–12 (Ct. App. 2009) (court held that trial court erred in excluding both first day of the period and last day of period, thus when trial was to start October 3, motion filed September 13 was timely).

Rule 1.6(a) Interactive audio and audiovisual devices—General Provisions.

1.6.a.010 When the appearance of a defendant or counsel is required in any court, the appearance may be made by the use of an interactive audiovisual device, including video conferencing equipment.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶ 7 (Ct. App. 2009) (defendant appeared at sentencing by interactive audiovisual system; because Rule 1.6(c)(3) precluded use of interactive audiovisual system at sentencing, court held trial court erred in holding sentencing without defendant physically present; because defendant did not object, court reviewed for fundamental error, and because it found defendant failed to show prejudice, affirmed sentence).

Rule 1.6(c)(3) Interactive audio and audiovisual devices—General Proceedings.

1.6.a.010 Rule 1.6 does not apply to a felony sentencing proceeding.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶ 7 (Ct. App. 2009) (defendant appeared at sentencing by interactive audiovisual system; because Rule 1.6(c)(3) precluded use of such system at sentencing, court held trial court erred in holding sentencing without defendant physically present; because defendant did not object, court reviewed for fundamental error, and because it found defendant failed to show prejudice, affirmed).

ARTICLE III. RIGHTS OF PARTIES.

Rule 6.1(a) Rights to counsel; waiver of rights to counsel—Right to be represented by counsel.

6.1.a.010 A defendant has the right to be represented in any criminal proceeding by retained counsel of the defendant's choosing.

State v. Aragon, 221 Ariz. 88, 210 P.3d 1259, ¶¶ 4–9 (Ct. App. 2009) (defendant was charged with aggravated DUI and was represented by appointed counsel; 6 days before trial, defendant's appointed counsel filed motion to continue so that private attorney that defendant wished to retain could file notice of appearance and have time to prepare for trial; court held trial court erred in refusing to grant defendant's motion to continue).

6.1.a.020 In determining whether to grant a continuance so that a defendant may be represented by retained counsel of the defendant's choosing, the trial court should consider such factors as: whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

State v. Aragon, 221 Ariz. 88, 210 P.3d 1259, ¶¶ 4–9 (Ct. App. 2009) (defendant was charged with aggravated DUI and was represented by appointed counsel; 6 days before trial, defendant's appointed counsel filed motion to continue so that private attorney that defendant wished to retain could file notice of appearance and have time to prepare for trial; court noted (1) defendant had legitimate reasons for request, (2) defendant had neither sought nor had been granted prior continuances, (3) case was not particularly complex, (4) all witnesses were law enforcement personnel, and (5) there were no victims, thus trial court erred in refusing to grant defendant's motion to continue).

Rule 6.1(b) Rights to counsel; waiver of rights to counsel—Right to appointed counsel.

6.1.b.020 "A defendant is not, however, entitled to counsel of choice, or to a meaningful relationship with his or her attorney."

State v. Peralta, 221 Ariz. 359, 212 P.3d 51, ¶ 4 (Ct. App. 2009).

6.1.b.060 In order for the trial court to exercise proper discretion in determining whether to substitute counsel, the trial court should consider several factors, including the following: (1) whether an irreconcilable conflict exists between counsel and the accused; (2) whether new counsel would be confronted with the same conflict; (3) the quality of counsel; (4) the timing of the defendant's request; (5) the reasons for the defendant's request; (6) the proclivity of the defendant to change counsel; (7) the time period already elapsed between the alleged offense and trial; (8) the disruption and delay expected in the proceedings if the request were to be granted; and (9) the inconvenience to witnesses.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 76–80 (2009) (defendant contended conflict was that he wanted to present evidence of actual innocence in mitigation, while his attorney wanted to present defendant's drug use in mitigation; because defendant would not have been permitted to present evidence of actual innocence in mitigation, there was no actual conflict).

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 81–83 (2009) (defendant’s attorney claimed actual conflict because their office had previously represented statutory victim who did not want to testify, and that this victim knew other persons who wanted to kill the victims; because contemplated testimony would have been to establish residual doubt, which would not have been admissible, or to rebut victim impact evidence, which state did not present, this victim’s testimony would not establish plausible alternative defense strategy, so this did not amount to actual conflict).

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 21–22 (2009) (defendant asserted irreconcilable conflict existed because presence of appointed counsel affected his ability to decide which arguments to make; court noted defendant made no claim that counsel was incompetent and that defendant had history of asserting irreconcilable conflicts with counsel; court stated disagreement with counsel over defense strategy does not mean irreconcilable conflict; court held no violation of right to counsel).

6.1.b.070 In the absence of evidence to the contrary, an appellate court will assume that the trial court made all necessary *Moody*-related findings required to support its ruling.

State v. Peralta, 221 Ariz. 359, 212 P.3d 51, ¶¶ 6–9 (Ct. App. 2009) (in his request for new counsel, defendant focused solely on his allegation that there was animosity and lack of communication between himself and his attorney; defendant contended trial court abused its discretion in not evaluating all *Moody* factors; court stated it would assume trial court made all necessary *Moody*-related findings required to support its ruling).

6.1.b.090 A defendant is not entitled to new counsel when the defendant’s own actions were the cause of the breakdown in the relationship with counsel.

State v. Peralta, 221 Ariz. 359, 212 P.3d 51, ¶¶ 15–18 (Ct. App. 2009) (because defendant did not want to communicate with his attorney on trial strategy and instead wanted to dictate how his attorney should do her job, defendant himself was primary cause of any damage to relationship between himself and counsel, trial court did not abuse discretion in denying motion for new counsel).

Rule 6.1(c) Rights to counsel; waiver of rights to counsel—Waiver of right to counsel.

6.1.c.120 For a waiver of the right to counsel to be effective, the defendant must knowingly, intelligently, and voluntarily waive the right to counsel.

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 10–20 (2009) (defendant filed several motions alleging that counsel had conflict of interest because they were not consulting him or actively representing him; at hearing, counsel advised trial court they were working on another capital case when appointed to represent defendant and that they had no ethical basis for moving to withdraw; defendant stated he wished to waive his right to counsel and represent himself; defendant avowed (1) he had read waiver form, (2) had no questions about it, that he understood (3) charges and penalties, (4) responsibilities and duties of representing himself, (5) this was complex case, (6) he could change his mind and accept counsel at any time, but could not repeat any completed proceedings; trial court found knowing, intelligent, and voluntary waiver of counsel; court noted dissatisfaction with counsel does not, of itself, warrant hearing to determine whether waiver was knowing, intelligent, and voluntary; court noted defendant’s “conflict” focused on counsel’s failure to communicate with him as quickly and as frequently as he wished, and this was not cognizable conflict).

Rule 6.3(c) Duties of counsel; withdrawal—Duty upon withdrawal.

6.3.c.020 In determining whether to grant a continuance so that a defendant may be represented by retained counsel of the defendant's choosing, the trial court should consider such factors as: whether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

State v. Aragon, 221 Ariz. 88, 210 P.3d 1259, ¶¶ 4–9 (Ct. App. 2009) (defendant was charged with aggravated DUI and was represented by appointed counsel; 6 days before trial, defendant's appointed counsel filed motion to continue so that private attorney that defendant wished to retain could file notice of appearance and have time to prepare for trial; court noted (1) defendant had legitimate reasons of request, (2) defendant had neither sought nor had been granted prior continuances, (3) case was not particularly complex, (4) all witnesses were law enforcement personnel, and (5) there were no victims, thus trial court erred in refusing to grant defendant's motion to continue).

6.3.c.040 The failure to include in the motion to withdraw a designation of a substituting attorney and a signed statement from that attorney that the attorney would be prepared for trial is a technical error that is not grounds for reversal if substantial justice is done and the error does not prejudice the defendant's rights.

State v. Aragon, 221 Ariz. 88, 210 P.3d 1259, ¶ 8 (Ct. App. 2009) (court noted purpose of rule was primarily to protect rights of defendants).

Rule 7.3(b) Conditions of release—Additional conditions.

7.3.b.010 The purposes of bail are (1) to assure the appearance of the accused, (2) to protect against intimidation of witnesses, and (3) to protect the safety of the victim, any other person, and the community; because the source of the pledged property or cash may affect whether the accused does appear in the future, the trial court has the authority to order the defendant to disclose source of funds used to post bail.

State v. Donahoe (Garibaldi-Osequera), 220 Ariz. 126, 203 P.3d 1186, ¶¶ 10–17 (Ct. App. 2009) (because pledged property or cash that comes from illegal activity may not in fact secure defendant's future appearance because defendant would have no legal right to pledged property or cash and losing it would be of no consequence and defendant may view forfeiture simply as cost of doing business, trial court has authority to order defendant to disclose source of funds used to post bail).

Rule 7.6(c)(2) Transfer and disposition of bond—Forfeiture procedure—Forfeiture.

7.6.c.2.010 The trial court may order forfeiture of all or part of the bond if it determines there has been a violation of the conditions of the appearance bond and there is no explanation or excuse for the violation.

State v. Copperstate Bail Bonds, 222 Ariz. 193, 213 P.3d 342, ¶ 21 (Ct. App. 2009) (trial court set bond and set preliminary hearing for 9/04; defendant's attorney filed motion to continue preliminary hearing, and trial court continued it to 9/14; defendant failed to appear at 9/14 preliminary hearing, so trial court issued warrant and set bond forfeiture hearing; defendant appeared at forfeiture hearing and said his reason for not appearing on 9/14 was that he did not know he had court hearing that date; court held

that defendant should have maintained contact with his attorneys, thus his explanation was not valid, so trial court did not abuse discretion in finding that defendant failed to give valid explanation).

Rule 7.6(d) Transfer and disposition of bond—Exoneration.

7.6.d.030 If the surety surrenders the defendant to the sheriff of the county in which the prosecution is pending, the trial court may exonerate the bond.

State v. Copperstate Bail Bonds, 222 Ariz. 193, 213 P.3d 342, ¶¶ 17–20 (Ct. App. 2009) (trial court set bond at \$45,000; Copperstate posted appearance bond for defendant; Crow paid \$4,500 deposit and signed as indemnitor for remaining \$40,500; defendant failed to appear at preliminary hearing, so trial court issued warrant and set bond forfeiture hearing; at forfeiture hearing, Crow appeared and defendant appeared; trial court advised defendant to turn himself in; trial court later ruled that Crow did not have standing to contest bond forfeiture; court held that Crow might have had interest in bond, so it remanded so trial court could consider Crow's involvement in defendant's surrender to custody).

Rule 10.2(a) Change of judge on request—Entitlement.

10.2.a.030 When a defendant has filed a timely notice of change of judge before state elects to seek the death penalty, the defendant is entitled to file a second timely notice of change of judge after the state elects to seek the death penalty.

Campbell v. Barton, 222 Ariz. 414, 215 P.3d 388, ¶¶ 7–11 (Ct. App. 2009) (defendant filed timely notice of change of judge; 14 days later, state filed notice that it was seeking death penalty, next day, defendant filed second notice of change of judge; court held trial court erred in not honoring that second notice of change of judge).

Rule 10.3(b) Change of place of trial—Prejudicial pretrial publicity.

10.3.b.010 With pre-trial publicity, no presumption of prejudice exists unless the publicity is so unfair, so prejudicial, and so pervasive that the court cannot give credibility to the jurors' answers during voir dire.

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶¶ 46–50 (2009) (because defendant failed to establish that media coverage created outrageous or carnival atmosphere, defendant failed to establish that prejudice should be presumed).

Rule 11.5(b) Hearing and orders—Orders.

11.5.b.040 A treatment order or combination of orders shall not be in effect for more than 21 months or the maximum possible sentence the defendant could have received, whichever is less, and this 21-month period runs from the date of the original finding of incompetency.

State v. Silva, 222 Ariz. 457, 216 P.3d 1203, ¶¶ 12–26 (Ct. App. 2009) (defendant contended trial court erred because it ordered three restoration periods totaling over 32 months, which exceeded 21 months allowed by statute; because first period was 8 months before trial court determined defendant was competent, second period was 6 months before trial court determined defendant was competent, and third period was 18 months before trial court determined defendant was competent, no one period exceeded 21-month limit, thus trial court did not exceed time limit provided by statute).

ARTICLE IV. PRETRIAL PROCEDURES.

Rule 12.9(a) Challenge to grand jury proceedings—Grounds.

12.9.a.040 The defendant is entitled to a new finding of probable cause if the conduct of the proceedings denied the defendant a substantial procedural right and the error prejudiced the defendant.

Francis v. Sanders, 222 Ariz. 423, 215 P.3d 397, ¶¶ 11–18 (Ct. App. 2009) (state sought to indict defendant for trafficking in stolen property; grand juror asked prosecutor about entrapment; court held prosecutor (1) did not accurately explain elements of entrapment and (2) incorrectly advised grand jurors that questions pertaining to entrapment were province of court or trial jury and not grand jury; and thus remanded for new determination of probable cause).

Rule 13.1(c) Definitions; timeliness—Timeliness.

13.1.b.010 An information must be filed within 10 days of a determination of probable cause, and if not timely filed, the case may be dismissed without prejudice upon the defendant's motion, but the defendant must file that motion no later than 20 days before trial; the filing of an information is not, however, a jurisdictional requirement, thus if the defendant does not challenge the lack of an information, the defendant may obtain relief on appeal only if the defendant is able to establish that any error was fundamental, and that the lack of a filed information caused prejudice.

State v. Maldonado, 2010 WL 27033, ¶¶ 7–26 (Jan. 7, 2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

Rule 13.2(a) Nature and contents—In general.

13.2.a.010 The charging document must be a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged, and must state for each count the official or customary citation of the statute that the defendant is alleged to have violated; there is, however, no requirement that the state notify the defendant how the state will prove that the defendant committed the offense.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 51–56 (2009) (defendant was charged with one count of premeditated murder and two counts of premeditated and felony murder with underlying felony being burglary; defendant contended he was denied due process because state did not provide notice until after close of evidence and settling of jury instructions that it intended to establish burglary based on defendant's entry into house with intent to commit murder; court held that, because defendant knew he was charged with premeditated murder in house and burglary of house, he had sufficient notice for charge of felony murder).

Rule 13.2(c) Nature and contents—Notice and necessarily included offenses.

13.2.c.010 To determine whether an offense is a lesser-included offense, a court may consider two possibilities: (1) the included offense is by its very nature always a constituent part of the major offense charged, or (2) the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the major offense charged, but the court may not consider the facts of the given case.

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶¶ 13–18 (Ct. App. 2009) (court concluded sexual conduct with minor was not lesser-included offense of continuous sexual abuse of child under elements test; court held that, because statute for continuous sexual abuse of child specifically provides that defendant shall not be charged in same proceeding with any other sexual offense with same victim unless either (1) offense occurred outside time period charged or (2) other sexual offense is charged in alternative, sexual conduct with minor could not be lesser-included offense of continuous sexual abuse of child under charging document test; court therefore vacated conviction and sentence for sexual conduct with minor).

13.2.c.020 In determining whether offenses are the “same” for purposes of double jeopardy, the court looks at the elements of the offenses and not to the particular facts that will be used to prove them.

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶ 7 (Ct. App. 2009) (court noted that court had rejected charging document test to determine whether two offenses are same for determining whether double jeopardy attached).

Rule 13.3(a) Joinder—Offenses.

13.3.a.015 A duplicative (duplicitous) indictment or information charges two or more distinct and separate offenses in a single count, while a duplicative (duplicitous) charge exists when the text of the indictment or information refers to only one criminal act, but the state introduces multiple alleged criminal acts to prove the charge.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶¶ 4–16 (Ct. App. 2009) (defendant was charged with sexual exploitation by “possessing, recording, filming, photographing, developing or duplicating” visual depictions of minor; court noted that § 13–3553(A)(1) prohibited recording, filming, photographing, developing or duplicating, while § 13–3553(A)(2) prohibited distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing, or exchanging; court concluded that, because section (A)(1) was directed at creation of visual image, while section (A)(2) was directed at acts that can happen only after visual image is created, these two sections address two separate harms, which suggested legislative intent to create two separate offenses; because single count of indictment charged two distinct and separate offenses, indictment was duplicitous).

13.3.a.020 In order to determine whether a statute creates one or more offenses, the court should consider the following: (1) the title of the statute; (2) whether there was a readily perceivable connection between the various acts; (3) whether those acts were consistent with, and not repugnant to, each other; and (4) whether those acts might inhere in the same transaction.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶¶ 4–16 (Ct. App. 2009) (defendant was charged with sexual exploitation by “possessing, recording, filming, photographing, developing or duplicating” visual depictions of minor; court noted that § 13–3553(A)(1) prohibited recording, filming, photographing, developing or duplicating, while § 13–3553(A)(2) prohibited distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing, or exchanging; court concluded that, because section (A)(1) was directed at creation of visual image, while section (A)(2) was directed at acts that can happen only after visual image is created, these two sections address two separate harms, which suggested legislative intent to create two separate offenses).

13.3.a.060 Failure to object that the charges are duplicative (duplicitous) either prior to or during trial constitutes waiver of that objection, thus a defendant may obtain relief only by showing error was fundamental and resulted in prejudice.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶¶ 8, 17–22 (Ct. App. 2009) (defendant was charged with sexual exploitation by “possessing, recording, filming, photographing, developing or duplicating” visual depictions of minor; court concluded that, because § 13–3553(A)(1) was directed at creation of visual image, while § 13–3553(A)(2) was directed at acts that can happen only after visual image is created, these two sections addressed two separate harms and created two separate offenses; because single count of indictment charged two distinct and separate offenses, indictment was duplicitous; because of possibility of non-unanimous jury verdict, defendant showed prejudice).

13.3.a.090 When an indictment is duplicative (duplicitous), dismissal is not required unless the defendant is prejudiced, which will happen if one of **three** things is present, the **third** of which is the possibility of a non-unanimous jury verdict.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶¶ 8, 17–22 (Ct. App. 2009) (defendant was charged with sexual exploitation by “possessing, recording, filming, photographing, developing or duplicating” visual depictions of minor; court concluded that, because § 13–3553(A)(1) was directed at creation of visual image, while § 13–3553(A)(2) was directed at acts that can happen only after visual image is created, these two sections addressed two separate harms and created two separate offenses; because single count of indictment charged two distinct and separate offenses, indictment was duplicitous; because of possibility of non-unanimous jury verdict, defendant showed prejudice).

Rule 13.5(b) Amendment of charges; defects in the charging document—Altering the charges; amendment to conform to the evidence.

13.5.b.030 The state may move to amend the charging document as long as the amendment does not change the nature of the offense or does not prejudice the defendant.

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039, ¶¶ 11–17 (2009) (grand jury indicted defendant for aggravated assault based on § 13–1203(A)(2) (placing another in reasonable apprehension of imminent physical injury); on first day of trial, before jury selection, state moved to amend indictment to change theory of assault from § 13–1203(A)(2) to § 13–1203(A)(1) (causing physical injury to another); court held that amendment changed nature of offense, but that any error was harmless because (1) defendant knew from allegation of dangerousness that state was alleging infliction of serious physical injury upon victim and that he would have to defend against that allegation; (2) defendant had police

reports, medical reports, and photographs showing victim's injuries; (3) joint pretrial statement said defendant hit victim in head and body with metal bar; (4) amendment was granted before jurors were selected and evidence presented; and (5) defendant's defense was all or nothing, that he was not the one who committed the offense).

13.5.b.040 The trial court may amend the charging document to correct formal or technical defects.

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039, ¶¶ 18–20 (2009) (grand jury indicted defendant for aggravated assault based on § 13–1203(A)(2) (placing another in reasonable apprehension of imminent physical injury); on first day of trial, before jury selection, state moved to amend indictment to change theory of assault from § 13–1203(A)(2) to § 13–1203(A)(1) (causing physical injury to another); court held amendment did not correct mistake of fact or remedy formal or technical defect in indictment, but instead changed nature of offense, and thus was not authorized under this rule).

13.5.b.060 The charging document will not be deemed amended to conform to the evidence if it violates the defendant's due process rights, which are (1) that the defendant is put on notice of the charges and has ample opportunity to prepare and defend against them, and (2) that the resolution of the amended charge provides a double jeopardy defense to any subsequent prosecution on the original charge.

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 27–43 (Ct. App. 2009) (defendant purchased merchandise using gift cards that had been altered so that information encoded on magnetic strips corresponded to various credit and debit cards belonging to persons other than defendant; defendant was charged with falsely using credit card under § 13–2104(A)(2); trial court instructed jurors not only for § 13–2104(A)(2), but also on altering credit card under § 13–2104(A)(1); court noted this action effectively amended indictment to conform to evidence, but that altering credit card would have had to have taken place at time and location where defendant used credit card and thus would have changed original indictment's factual allegations, thus trial court erred in amending indictment because amendment changed nature of offense originally charged; however, because defendant did not object at trial, court reviewed for fundamental error only, and held (1) defendant failed to prove that error was fundamental error, and (2) even if error was fundamental, defendant was unable to establish prejudice, so defendant was not entitled to relief).

Rule 13.5(c) Amendment of charges; defects in the charging document—Amendments To Conform to Capital Sentencing Allegations; Challenges to Capital Sentencing Allegations.

13.5.c.010 Rule 13.5(c) permits a defendant in a capital murder case to request that the trial court make a finding whether there is probable cause to believe that an aggravating circumstance exists.

Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210, ¶¶ 5–15 (2009) (defendant filed motion to dismiss death penalty notice because trial court had made no finding of probable cause that aggravating circumstance existed (that defendant committed murder in cruel manner); trial court denied motion; court vacated trial court's order denying probable cause hearing and remanded).

13.5.c.020 At hearing to determine whether there is probable cause to believe that an aggravating circumstance exists, the procedure is governed by Rule 5, which means that the state has the burden of proof, and the trial court should admit only evidence that is material to whether probable cause exists; the trial court may consider evidence without regard to any motions to suppress, and may consider certain forms of hearsay.

Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210, ¶¶ 18–20 (2009) (court vacated trial court's order denying probable cause hearing and remanded for trial court to follow procedure).

Rule 15.1(b) Disclosure by state—Supplemental Disclosure; Scope—Matters relating to guilt, innocence or punishment.

15.1.b.050 The state is required to disclose the results of scientific tests, experiments or comparisons that have been completed, thus if the test, experiment, or comparison has not been completed, there is nothing for the state to disclose at that time.

State ex rel. Thomas v. Newell (Milegro), 221 Ariz. 112, 210 P.3d 1283, ¶¶ 9–16 (Ct. App. 2009) (at initial pretrial conference, defendant's attorney indicated he had not received analysis of print lifts; trial court *sua sponte* ordered state to disclose analysis within 21 days; court held that, because testing was not complete, state had nothing to disclose, thus trial court erred in finding that state had violated rule of discovery and thus trial court abused discretion in imposing sanction).

Rule 15.1(g) Disclosure by state—Disclosure by order of the court.

15.1.g.030 Before a trial court may order disclosure, a defendant must show a “substantial need” for the requested information, and that the defendant “is unable without undue hardship to obtain the substantial equivalent by other means.”

State v. Bernini (Daughters-White), 222 Ariz. 607, 218 P.3d 1064, ¶¶ 8–15 (Ct. App. 2009) (because defendants failed to establish how or even if alleged software deficiencies affected their intoxilyzer tests, trial court abused discretion in ordering state to produce software for Intoxilyzer 8000).

15.1.g.040 The state has an obligation under Rule 15.1 to disclose material information not in its possession or under its control only if: (1) the state has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defendant.

State v. Bernini (Daughters-White), 222 Ariz. 607, 218 P.3d 1064, ¶¶ 6–7 (Ct. App. 2009) (after remand, trial court concluded court of appeals had vacated trial court's order that state disclose source code, but had not vacated trial court's order that state disclose software for Intoxilyzer; court of appeals stated that its previous opinion vacated trial court's entire order, which included both source code and related software).

State v. Bernini (Daughters-White), 220 Ariz. 536, 207 P.3d 789, ¶¶ 7–9 (Ct. App. 2009) (DUI defendants requested source code for Intoxilyzer 8000; trial court found that source code was not in possession of prosecutor or any one controlled by prosecutor; trial court nonetheless ordered prosecutor to obtain source code and give it to defendants; court held record supported conclusion that state had neither possession of source code nor control over manufacturer of Intoxilyzer, and because there was no evidence in record to support trial court's conclusion that state had better access to source code than defendant, trial court erred in ordering state to obtain and disclose source code).

Rule 15.7(a) Sanctions—Failure to make disclosure.

15.7.a.100 A defendant may not obtain relief on appeal based on the action of the trial court if any error that may have been made is harmless.

State v. McKenna, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 19–23 (Ct. App. 2009) (defendant was convicted of felony murder; defendant contended trial court erred in precluding his medical records, which showed defendant sought treatment day after killing for cut on his nose and that he reported he had been hit in face with bottle, because medical records would have supported claim that killing resulted from physical altercation and thus killing was manslaughter or second-degree murder at most; court noted there were no lesser-included offenses for felony murder, so any error in precluding medical records would have been harmless).

Rule 15.7(b) Sanctions—Motion for Sanctions.

15.7.b.010 This rule presumes a written motion because it provides that “[n]o motion brought under Rule 15.7(a) will be considered or scheduled unless a separate statement of moving counsel is attached”

State ex rel. Thomas v. Newell (Milegro), 221 Ariz. 112, 210 P.3d 1283, ¶ 9 n.1 (Ct. App. 2009) (at initial pretrial conference, defendant’s attorney indicated he had not received analysis of print lifts; trial court *sua sponte* ordered state to disclose analysis within 21 days; court noted sanction did not comply with Rule 15.7 because there was no written or oral motion and no separate statement of counsel, and trial court did not consider factors in the rule).

Rule 16.1(b) General provisions—Making of motion before trial.

16.1.b.010 A party is required to make all motions no later than 20 days prior to trial, or at such other time as the court may direct; in making this determination, the day of the act or event from which the designated period of time begins to run is not to be included, and the last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which case the period shall run until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday.

State v. Tillmon, 222 Ariz. 452, 216 P.3d 1198, ¶¶ 7–12 (Ct. App. 2009) (court held that trial court erred in excluding both first and last day of period, thus when trial was to start October 3, motion filed September 13 was timely).

Rule 16.6(b) Dismissal of prosecution—On defendant’s motion.

16.6.b.020 Although this rule provides that the trial court may dismiss the charges when the charging document is insufficient as a matter of law, the comment to this rule notes that dismissal may be based on any legally recognized grounds.

State v. Huffman, 222 Ariz. 416, 215 P.3d 390, ¶¶ 8–12 (Ct. App. 2009) (defendant’s first two trial resulted in mistrials because jurors could not reach unanimous verdicts; defendant contended due process should bar third trial; court noted that, under Rule 16.6(d), trial court could dismiss with prejudice if interests of justice so required).

Rule 16.6(d) Dismissal of prosecution—Effect of dismissal.

16.6.d.020 The rule favors a dismissal without prejudice, and there can be no dismissal with prejudice unless the trial court determines something in the interests of justice requires it, which usually means a showing of bad faith on the part of the state and prejudice to the defendant.

State v. Huffman, 222 Ariz. 416, 215 P.3d 390, ¶¶ 15–18 (Ct. App. 2009) (defendant's first two trials resulted in mistrials because jurors could not reach unanimous verdicts; defendant contended due process should bar third trial; court noted that, under Rule 16.6(d), trial court could dismiss with prejudice if interests of justice so required; court noted that prosecutor outlined how evidence at third trial would differ from that offered in first two trials, and thus held trial court did not abuse discretion in denying defendant's motion to dismiss).

ARTICLE V. PLEAS OF GUILTY AND NO CONTEST.

Rule 17.1(a) Pleading by defendant—Personal appearance; appropriate court.

17.1.a.020 Because Rule 17.1(a)(1) provides that a “plea shall be accepted only when made by the defendant personally in open court,” as long as the defendant makes the plea personally in open court, the trial court must accept it, even if the defendant only wants to plead guilty to some, but not all, of the charges.

Alejandro v. Harrison, 223 Ariz. 21, 219 P.3d 231, ¶¶ 9–11, 19 (Ct. App. 2009) (defendant was charged with one count of burglary, three counts of aggravated assault against police officer, one count of unlawful flight from law enforcement vehicle, and one count of criminal trespass; on first day of trial, defendant said he wished to plead guilty to burglary, unlawful flight, and criminal trespass, thus he would go to trial only on aggravated assault against police officers; state objected; court held that trial court erred in refusing to accept defendant's plea to fewer than all charges based solely on state's objection, and held trial court must accept plea as long as it is voluntary and intelligent, and there is factual basis).

Rule 17.2 Duty of court to advise defendant of his rights and of the consequences of pleading guilty or no contest.

17.2.030 Even if a stipulation is “tantamount to a guilty plea” or the “functional equivalent of a guilty plea,” the trial court is not required to go through a guilty plea litany unless the defendant actually pleads guilty.

State v. Allen, 223 Ariz. 125, 220 P.3d 245, ¶¶ 15–20 (2009) (defendant was charged with possession of marijuana; trial court read to jurors stipulation between defendant and state that defendant was in possession of usable amount of marijuana; court held that, even if defendant stipulates to all elements of offense, that is not plea of guilty, and that unless defendant pleads guilty to offense, trial court does not have to go through guilty plea litany).

Rule 17.4(f) Plea negotiations and agreements—Disclosure of confidentiality.

17.4.f.010 If the parties are unable to reach an agreement, or if the agreement is revoked, rejected, or withdrawn, or if the judgment is later vacated or reversed, neither the plea discussion nor any resulting agreement, plea, or judgment, nor statements made at a hearing on the plea, shall be admissible against the defendant in any criminal or civil action or administrative proceeding.

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶¶ 5–10 (Ct App. 2009) (prosecutor told defendant he would have to participate in “debriefing” or “free talk” if defendant was interested in plea agreement; on 4/11/07, defendant gave first statement; on 4/19/07, defendant and state entered into plea agreement; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; state implicitly conceded that Rule 17.4(f) precluded admission of defendant’s first statement in case-in-chief).

17.4.f.020 Although this rule prohibits the introduction of the plea discussions and any statements made at a hearing on the plea, it does not preclude statements made in connection with a plea or offer, such as after-plea statements made pursuant to a truthful cooperation clause.

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶¶ 5–13 (Ct App. 2009) (prosecutor told defendant he would have to participate in “debriefing” or “free talk” if defendant was interested in plea agreement; on 4/11/07, defendant gave first statement; on 4/19/07, defendant and state entered into plea agreement that provided that defendant would tell truth and cooperate with investigation; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; court held that, because unlike Rule 410, Rule 17.4(f) does not preclude “statements made in connection with” plea, Rule 17.4(f) did not preclude state from using second and third statements in case-in-chief).

17.4.f.030 Although this rule prohibits the introduction of the plea discussions and any statements made at a hearing on the plea, a defendant may waive that protection by entering into an agreement that provides (1) that the defendant will cooperate truthfully, (2) that the state may withdraw from the plea agreement if the defendant does not cooperate truthfully, and (3) if the state withdraws from the plea agreement, it may use against the defendant any statements made pursuant to the plea agreement.

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶¶ 26–34 (Ct App. 2009) (prosecutor told defendant he would have to participate in “debriefing” or “free talk” if defendant was interested in plea agreement; on 4/11/07, defendant gave statement; on 4/19/07, defendant and state entered into plea agreement that provided that defendant would tell truth and cooperate with investigation; on 7/12/07, defendant gave second statement, and on 8/27/07, gave third statement; because in third statement, defendant contradicted what he had said in first and second statements, trial court allowed state to withdraw from plea agreement; trial court ruled that state could not use any of these statements in case-in-chief, but could use them on cross-examination; court held that, although Rule 17.4(f) would preclude state from using first statement, defendant waived protection of that rule by entering into agreement and then breaching it, thus state could use first statement in case-in-chief).

Rule 17.4(g) Plea negotiations and agreements—Automatic change of judge.

17.4.g.020 This rule permits a defendant to have a change of judge when a plea is withdrawn after the trial court has reviewed the presentence report in that case, but it does not give the defendant the right to a change of judge when the trial court has reviewed the presentence report in some other case.

Lopez v. Kearney, 222 Ariz. 133, 213 P.3d 282, ¶¶ 9–20 (Ct. App. 2009) (defendant pled guilty to kidnapping, trial court reviewed presentence report, and then sentenced defendant; 6 months later, defendant entered into plea agreement in murder case, but trial court refused to accept plea, and never did review any presentence report in murder case; court held defendant was not entitled to notice of change of judge in murder case).

Rule 17.6 Admission of a prior conviction.

17.6.020 Rule 17.6 applies when the defendant admits a prior conviction after a trial or submission, and provides that the trial court must comply with the requirements of a guilty plea; this rule applies whether the defendant admits to prior conviction or the parties stipulate that the defendant has a prior conviction.

State v. Osborn, 220 Ariz. 174, 204 P.3d 432, ¶¶ 5–7 (Ct. App. 2009) (defendant was charged with misconduct involving weapons and possession or use of dangerous drugs; during trial, defendant stipulated to prior conviction as part of weapons offense; jurors convicted defendant of drug offense, but could not reach verdict on weapons offense; trial court sentenced defendant on drug offense with prior conviction; court held trial court erred in not fully advising defendant of ramification of admitting prior conviction, specifically how admission of prior conviction for the weapons offense would affect sentence for drug offense).

17.6.070 If a defendant fails to object to the failure of the trial court to follow Rule 17.6 procedure when the defendant admits or stipulates to the existence of a prior conviction, the court must review for fundamental error, thus in order to obtain relief, the defendant must show prejudice, which requires a showing that the defendant would not have admitted or stipulated to the prior conviction if the trial court had followed the proper Rule 17.6 procedure; if defendant makes that showing, defendant is entitled to a resentencing.

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912, ¶¶ 10–20 (Ct. App. 2009) (although defendant informally admitted prior convictions, trial court did not follow proper Rule 17.2 and 17.6 procedure, which court found was fundamental error, so court remanded for defendant to demonstrate she was prejudiced by trial court's error).

ARTICLE VI. TRIAL.

Rule 19.1(mmt) Conduct of trial—Motion for mistrial.

19.1.mmt.020 A declaration of a mistrial is the most dramatic remedy for trial error, and should be granted only when it appears that justice will be thwarted unless the jury is dismissed and a new trial granted.

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 48–51 (2009) (in opening statement, prosecutor used PowerPoint presentation that included photographs, three of which trial court later refused to admit in evidence; court noted that prosecutor's opening statement should not refer to inadmissible evidence, but here prosecutor did not deliberately attempt to prejudice jurors; because trial court denied admission of three photographs because they were cumulative and not because they were gruesome, court held defendant showed no prejudice).

19.1.mmt.040 If the defendant does not object, the appellate court will review for fundamental error only.

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 16–17 (Ct. App. 2009) (although defendant did not object at trial, on appeal he contended prosecutor improperly vouched for witnesses when in opening statement she said that, "through good law enforcement investigation," police found defendant; court held that, even if it was improper for prosecutor to characterize quality of police investigation, this isolated statement was not so egregious that it resulted in denial of due process).

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 16–18 (Ct. App. 2009) (court held prosecutor's statement "the state is satisfied the burglary with the motor vehicle and what tool is it?" was nothing more than assertion that state had presented sufficient evidence that burglary had occurred and did not place prestige of government behind witness).

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 16–19 (Ct. App. 2009) (court held that prosecutor's characterization of defense closing as attacking police was response to defense argument about deficiencies in police investigation).

19.1.mmt.070 A defendant is entitled to a mistrial based on **juror** misconduct only if the defendant either shows actual prejudice or if prejudice may be fairly presumed from the facts.

State v. Slover, 220 Ariz. 239, 204 P.3d 1088, ¶¶ 19–24 (Ct. App. 2009) (at close of third day of trial, prosecutor informed trial court that she had just learned her daughter had been spending time with daughter of one of jurors; trial court questioned and then excused that juror; because juror had told other jurors only that her daughter had played with daughter of one of the attorneys, and because only juror who remembered hearing this assured trial court that he could be impartial; defendant failed to show prejudice).

19.1.mmt.100 To determine whether the **prosecutor's** remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether the remarks or actions call to the attention of the jurors matters that they would not be justified in considering, and (2) the probability that the jurors, under the circumstances of the case, were influenced.

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 45–46 (2009) (prosecutor asked detective if defendant’s attorney knew jail tapes of phone calls were destroyed after 6 months, and detective said that defendant’s attorney knew this; defendant moved for mistrial contending prosecutor’s question shifted burden of proof to defendant; court held that question and answer were to rebut any contention of bad faith by police in not preserving all tapes).

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 45, 47 (2009) (during guilt phase, prosecutor told jurors that state had burden of proof “in this phase”; defendant moved for mistrial contending this statement improperly implied there necessarily would be future phases; trial court noted that prosecutor, defendant’s attorney, and trial court itself had made it plain to jurors that trial could involve three phases).

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 48–51 (2009) (in opening statement, prosecutor used PowerPoint presentation that included photographs, three of which trial court later refused to admit in evidence; court noted that prosecutor’s opening statement should not refer to inadmissible evidence, but here prosecutor did not deliberately attempt to prejudice jurors; because trial court denied admission of three photographs because they were cumulative and not because they were gruesome, court held defendant showed no prejudice).

19.1.mmt.110 A prosecutor’s actions constitute reversible error only if (1) misconduct exists, and (2) a reasonable likelihood exists that the misconduct could have affected the jurors’ verdict.

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 42–44 (2009) (defendant’s attorney moved for mistrial because prosecutor (female) told defendant’s attorney (also female) to be careful about contracting gonorrhea from defendant; court held prosecutor’s statement was entirely unprofessional, but because prosecutor made statement outside presence of jurors, statement did not deprive defendant of fair trial).

Rule 20 Judgment of acquittal.

20.090 The substantial evidence may be either circumstantial or direct, and the probative value of the evidence is not reduced merely because it is circumstantial.

State v. Jernigan, 221 Ariz. 17, 209 P.3d 153, ¶¶ 5, 18 (Ct. App. Jan. 13, 2009) (court held that it could be inferred from defendant’s possession of more than one stolen item that defendant intended to appropriate that stolen property for his own use).

Rule 21.1 Applicable law.

21.1.020 In assessing the adequacy of jury instructions, the court may take into account the closing arguments of counsel.

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 6–17 (Ct. App. 2009) (defendant’s defense was he was involuntarily intoxicated because girlfriend had secretly slipped two Ecstasy pills into his drink; defendant contended trial court erred in failing to instruct (1) on level of proof necessary to prove involuntary intoxication, (2) that state had burden of proving every element of offense beyond reasonable doubt, and (3) on operative effect of finding of involuntary intoxication; because defendant did not object at trial, court reviewed for fundamental error only and found none, noting in part that both attorneys’ arguments covered defendant’s areas of concern).

21.1.030 The trial court is not required to give an instruction that is an incorrect statement of the law, and should instead give an instruction only if it is a correct statement of the law.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶¶ 24–27 (Ct. App. 2009) (defendant is entitled to be acquitted if there is reasonable doubt whether guilt is satisfactorily shown; even though jurors have ability to return verdict of not guilty even if state has proved all elements of offense beyond a reasonable doubt, defendant has no right to jury nullification instruction, which would tell them that they may find defendant not guilty even if they find state has proved its case beyond reasonable doubt; trial court correctly refused defendant's following proposed instruction: "You are . . . entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe strongly that conscience and justice require a verdict of not guilty. No one can require you to return a verdict that does violence to your conscience.").

Causation

21.1.096 An intervening force is not a superseding cause if the defendant's negligence creates the very risk of harm that causes the injury, or when the defendant's conduct increases the foreseeable risk of a particular harm occurring through a second actor.

State v. Slover, 220 Ariz. 239, 204 P.3d 1088, ¶¶ 10–14 (Ct. App. 2009) (while intoxicated, defendant drove off roadway; truck rolled down embankment and landed on roof over shallow creek; officers found passenger-victim dead, lying in creek with head submerged in water; victim had BAC of .231; defendant contended that, because there was no definitive evidence that crash rendered victim unconscious, victim could have crawled out of truck himself and then drowned, which defendant contended was superseding cause; court held defendant's negligence was reason victim was in or near creek, intoxicated, with head injuries, or at very least increased foreseeable risk that victim would die in accident, thus defendant was not entitled to superseding cause instruction).

Lesser-included offenses.

21.1.340 To determine whether an offense is a lesser-included offense, a court may consider two possibilities: (1) the included offense is by its very nature always a constituent part of the major offense charged, or (2) the terms of the charging document describe the lesser offense even though the lesser offense would not always form a constituent part of the major offense charged, but the court may not consider the facts of the given case.

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶¶ 13–18 (Ct. App. 2009) (court concluded sexual conduct with minor was not lesser-included offense of continuous sexual abuse of child under elements test; court held that, because statute for continuous sexual abuse of child specifically provides that defendant shall not be charged in same proceeding with any other sexual offense with same victim unless either (1) offense occurred outside time period charged or (2) other sexual offense is charged in alternative, sexual conduct with minor could not be lesser-included offense of continuous sexual abuse of child under charging document test; court therefore vacated conviction and sentence for sexual conduct with minor).

21.1.390 When a defendant does not request a lesser-included offense instruction, the court reviews the record for fundamental error only.

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶¶ 20–31 (2009) (defendant was charged with kidnapping, and although he did not request instruction on unlawful imprisonment, he contended trial court committed fundamental error in not giving that instruction; because defendant’s defense was that he did not commit any crime (all or nothing defense), failure to give unlawful imprisonment instruction did not take from defendant any right essential to his defense, so failure to instruct on unlawful imprisonment was not fundamental error).

RAJI S.C. 5 Burden of Proof.

5.sc.030 The Arizona Supreme Court has concluded that its reasonable doubt instruction (*Portillo* instruction) is adequate, does not lower the state’s burden of proof to a clear and convincing evidence standard, does not shift the burden of proof to the defendant, and does not misinform the jurors that the state need not overcome every doubt.

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 64–65 (2009) (court held *Portillo* instruction was required in aggravation phase of capital case because aggravating circumstance was analogous to element of offense).

5.sc.040 The Arizona Supreme Court’s reasonable doubt instruction (*Portillo* instruction) is adequate, thus there is no need to amend it; because court of appeals does not have the authority to overrule a decision of the Arizona Supreme Court, any request to modify that instruction should be directed to the Arizona Supreme Court.

State v. Paredes-Solano, ___ Ariz. ___, 222 P.3d 900, ¶ 23 (Ct. App. 2009) (defendant contended *Portillo* instruction was structural error and lowered state’s burden of proof; court stated it was bound to follow Arizona Supreme Court’s decision).

State v. Johnson, 220 Ariz. 551, 207 P.3d 804, ¶ 16 (Ct. App. 2009) (defendant contended *Portillo* instruction was structural error and lowered state’s burden of proof; court stated it was bound to follow Arizona Supreme Court’s decision).

13–105(12) Definitions. (Dangerous instrument.)

.010 A “dangerous instrument” is anything that, under the circumstances that it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury, which could include a dog.

State v. Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 69–76 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; court held trial court should have given instruction so that jurors could have determined whether or not dogs could be considered dangerous instruments).

13–404 Justification; self-defense.

21.13.404.010 If a defendant claims he or she used or threatened to use physical force against the victim because the victim was using unlawful physical force, the defendant is entitled to have the jurors instructed that unlawful physical force includes the statutory elements of the crimes of endangerment, threatening or intimidating, and aggravated assault.

State v. Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 55–66 (Ct. App. 2009) (defendant killed victim, and claimed he acted in self-defense; court held trial court erred in refusing to give defendant’s requested instruction on elements of crimes of endangerment, threatening or intimidating, and aggravated assault).

21.13.404.020 Prior to April 24, 2006, the defendant had the burden of proving justification, including self-defense, by a preponderance of the evidence; if the defendant failed to request such an instruction, the court must review under a fundamental error analysis.

State v. Valverde, 220 Ariz. 582, 208 P.3d 233, ¶¶ 9–18 (2009) (defendant’s attorney did not request specific instruction on defendant’s burden of proof for self-defense; trial court instructed on state’s burden to prove all elements of offense beyond reasonable doubt and elements defendant had to prove to justify use of physical force in self-defense, but did not instruct on what level of proof was required to prove self-defense; court reviewed under fundamental error analysis; court noted that defendant’s attorney argued to jurors correct standard, and held that defendant therefore failed to establish prejudice).

13–1105 First-degree murder—Premeditated murder.

21.13.1105.010 To prove premeditated first-degree murder, the state must prove to the jurors beyond a reasonable doubt the defendant actually reflected; to the extent the statute provides that “proof of actual reflection is not required,” that only means proof by direct evidence is not required, thus the state may prove reflection by circumstantial evidence, such as the passage of time; in future cases, trial courts should instruct the jurors as follows: “Premeditation” means the defendant intended to kill another human being [knew he/she would kill another human being], and that after forming that intent [knowledge], reflected on the decision before killing; it is this reflection, regardless of the length of time in which it occurs, that distinguishes first-degree murder from second-degree murder; an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion.

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶¶ 15–20 (2009) (defendant contended trial court committed fundamental error in giving following instruction: “Premeditation means the defendant acts with the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection; an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion”; court held that, because instruction did not state premeditation could be “as instantaneous as successive thoughts of mind” and did not state that “proof of actual reflection is not required,” instruction was not error).

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 64–72 (2009) (defendant was charged with one count of premeditated murder and two counts of premeditated and felony murder with underlying felony being burglary; court held trial court erred in giving instruction “proof of actual reflection is not required”; court held that error was harmless for first murder defendant committed, but was not harmless for two subsequent murders).

Rule 21.3(c) Rulings on instructions and forms of verdict—Waiver of error.

21.3.c.040 Fundamental error is error that goes to the foundation of the defendant’s case, error that takes from the defendant a right essential to the defense the defendant presented, and error of such magnitude that the defendant could not possibly receive a fair trial, and that defendant was prejudiced by this error; the defendant has the burden of persuading the court of these elements, and if the defendant fails to do so, the defendant is not entitled to relief.

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶¶ 20–31 (2009) (defendant was charged with kidnapping, and although he did not request instruction on unlawful imprisonment, he contended trial court committed fundamental error in not giving that instruction; because defendant’s defense was that he did not commit any crime (all or nothing defense), failure to give unlawful imprisonment instruction did not take from defendant any right essential to his defense, so failure to instruct on unlawful imprisonment was not fundamental error).

***Willits* instruction.**

21.1.810 A defendant is not entitled to a *Willits* instruction unless the defendant can show that (1) the state failed to preserve material evidence that was accessible, (2) the evidence might have exonerated the defendant, and (3) as a result, the defendant suffered prejudice.

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 39–41 (2009) (MCSO kept digital tape recordings of jail telephone calls for 6 months, and then reused tapes; officers obtained court order to listen to tapes of calls defendant made, and copied 27 of them; officers did not copy nine tapes, and those were recorded over after 6 months; defendant moved to suppress 27 tapes that were copied, which trial court denied; court held that defendant failed to establish that erased tapes might have exonerated him or even mitigated his participation in murder plot, thus trial court did not abuse discretion in refusing *Willits* instruction).

Rule 22.3 Further review of evidence and additional instructions.

22.3.010 Once the jurors have retired to deliberate, the trial court may not communicate with them without first giving the defendant and the attorneys notice and giving them an opportunity to be present; any error may, however, be harmless.

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 84–88 (2009) (court held trial court erred in instructing jurors without first consulting counsel; because trial court merely instructed jurors to give certain words their usual and accepted meanings, any error was harmless).

ARTICLE VII. POST-VERDICT PROCEEDINGS.

Rule 24.1(c)(2) Motion for new trial—Prosecutorial misconduct.

24.1.c.215 A defendant waives any challenge to the prosecutor’s remarks or actions by failing to object either at the time they are made or at the earliest opportunity, unless the making of the remarks is fundamental error.

State v. McKenna, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 24–28 (Ct. App. 2009) (defendant was convicted of felony murder; trial court granted prosecutor’s motion to preclude defendant’s medical records, which showed defendant sought treatment day after killing for cut on his nose and that he reported he had been hit in face with bottle; defendant contended prosecutor committed prosecutorial misconduct by arguing to jurors that there was no evidence to support defendant’s theory that victim attacked him with broken beer bottle; court noted that defendant did not object, so review was for fundamental error only; court concluded prosecutor was arguing solely on bases of evidence that had been presented to jurors, thus there was no error).

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 35–37 (Ct. App. 2009) (because defendant failed to present to trial court any claim of prosecutorial misconduct, court reviewed for fundamental error only, and concluded defendant failed to prove error).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 22–27 (Ct. App. 2009) (defendant contended on appeal that prosecutor's closing argument (1) appealed to jurors' fears, unfairly inflamed their passions, and unfairly appealed to their prejudice and sympathy, and (2) addressed defendant's failure to call certain witness and thus confused jurors about who had burden of proof; because at trial defendant did not object to prosecutor's closing argument, court reviewed for fundamental error only and found none).

24.1.c.225 The prosecutor is permitted to make comments that are a fair rebuttal to comments made by the defendant.

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 24–25 (Ct. App. 2009) (defendant contended prosecutor's closing argument addressing defendant's demeanor in court and how it would be expected that defendant would act differently in court as opposed to how he would have acted if committing crime appealed to jurors' fears, unfairly inflamed their passions, and unfairly appealed to their prejudice and sympathy; court noted that this was in response to defendant's attorney's request that jurors consider defendant's demeanor while in court and asking jurors if he looked like someone who would commit those crimes).

24.1.c.230 To prove prosecutorial misconduct, a defendant must show (1) the state's actions were improper, and (2) a reasonable likelihood exists that the misconduct could have affected the jurors' verdict, thereby denying the defendant a fair trial.

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶¶ 35–37 (Ct. App. 2009) (defendant contended prosecutor engaged in misconduct (1) by sending inmate back to cell and not instructing him not to elicit information from defendant about his case, and (2) allowing defendant's girlfriend's mother to seize letters defendant sent to girlfriend; because court concluded both inmate and mother were not acting as agents of state, court held defendant failed to establish prosecutor's actions were improper).

24.1.c.240 The prosecutor may comment on the failure of the defendant to produce evidence as long as that does not highlight the defendant's failure to testify, such as when the defendant is the only one who could have produced the evidence.

State v. McKenna, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 29–34 (Ct. App. 2009) (in closing, defendant's attorney contended state failed to prove motive and thus failed to prove premeditation; prosecutor then argued to jurors that defendant could have told police why he did what he did but he did not, and that was why there was no evidence of motive; defendant contended this was comment on his failure to testify; court held that it was permissible for prosecutor to argue that defendant, in his statement to police, did not give full explanation, and thus this was not comment on defendant's failure to testify).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 26–27 (Ct. App. 2009) (because defendant offered evidence in attempt to show identification never happened, prosecutor properly noted in closing argument that, although defendant had no burden to present evidence or prove anything, he could have called another deputy who (according to deputy who did testify) had been present at time of identification).

Rule 24.2(a) Motion to vacate judgment—Grounds for motion.

24.2.a.020 Because a defendant may raise a claim of ineffective assistance of counsel only in a petition for post-conviction relief, a defendant is not entitled to raise such a claim in a motion to vacate judgment.

State v. Sang Le, 221 Ariz. 580, 212 P.3d 918, ¶¶ 2–6 (Ct. App. 2009) (following jury trial and sentencing, defendant filed motion to vacate judgment alleging *Strickland* errors; after holding several evidentiary hearings, trial court denied motion; court held defendant was not entitled to raise claim of ineffective assistance of counsel in motion to vacate judgment, and thus affirmed defendant's judgment and sentence).

Rule 26.9 Presence of the defendant; sentencing in absentia.

26.9.020 The defendant has the right to be present during the sentencing.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 6–13 (Ct. App. 2009) (defendant appeared at sentencing by interactive audiovisual system; court held trial court erred in holding sentencing without defendant physically present; because defendant did not object, court reviewed for fundamental error, and because it found defendant failed to show prejudice, affirmed sentence).

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 6–13 (Ct. App. 2009) (court held trial court erred in holding sentencing with defendant appearing by interactive audiovisual system; because defendant did not object, court review for fundamental error and because it found defendant failed to show prejudice, affirmed sentence).

26.9.030 A defendant may waive the right to be present at sentencing as long as the defendant makes a knowing, voluntary, and intelligent waiver.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 12–13 (Ct. App. 2009) (at sentencing, defendant appeared by interactive audiovisual system; court noted that defendant never made personal waiver of right to be present, and thus held trial court erred in holding sentencing without defendant physically present).

26.9.040 A defendant may forfeit the right to attend judicial proceedings if, after being warned by the court, the defendant continues to behave in such a disorderly, disruptive, or disrespectful way that the proceedings cannot take place with the defendant present.

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 9–10 (Ct. App. 2009) (at sentencing, defendant appeared by interactive audiovisual system; court noted that, although defendant was disruptive at initial appearance, he was cooperative at violation hearing, thus his behavior at earlier hearing, standing alone, was not sufficient ground for excluding him from sentencing hearing).

Rule 27.6(a) Initiation of revocation proceedings; securing the probationer's presence; notice—Petition to revoke probation.

27.6.a.010 Once the period of probation has expired, the court lacks jurisdiction to revoke probation, but the running of the period of probation is tolled from the filing of the petition to revoke probation to the termination of the revocation of probation proceedings.

State v. Chacon, 221 Ariz. 523, 212 P.3d 861, ¶¶ 5–8 (Ct. App. 2009) (defendant was placed on probation 9/24/04 for 3 years; on 7/23/07, probation officer prepared petition to revoke, which commissioner signed 8/21/07, but it was not filed with clerk of court until 1/16/08; on 9/20/07, probation officer prepared second petition to revoke alleging different grounds, but that petition was never signed by the trial court or filed with clerk of court; at hearing 11/02/07, state dismissed 7/23/07 petition and stated it wished to proceed on 9/20/07 petition; trial court found defendant had violated his probation and placed defendant on intensive probation; court held that, because state dismissed 7/23/07 petition and because 9/20/07 petition was never filed, trial court did not have jurisdiction to revoke probation once probation expired on 9/24/07, and so vacated trial court's finding of probation violation).

ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

Rule 31.8(a) The record on appeal; transcripts; duty of court reporter—Composition of the record on appeal; additions; deletions.

31.8.a.020 Within 5 days after the filing of the notice of appeal, the appellant may file with the clerk of the trial court a designation to include in the record the trial court materials that appellant deems necessary, and to delete from the record all trial court materials appellant deems unnecessary; within 12 days after the filing of the notice of appeal, the appellee may file with the clerk of the trial court a designation to include in the record those trial court materials appellee deems necessary, and any trial court materials deleted by the appellant.

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912, ¶ 8 (Ct. App. 2009) (defendant was charged with theft of means of transportation, and contended trial court erred when it refused to give her requested instruction on unlawful use of means of transportation; because record did not contain defendant's requested instruction, court presumed trial court acted correctly and noted defendant had opportunity to add requested instruction to record on appeal but did not).

31.8.a.040 When there is a discrepancy between the reporter's transcript and the minute entry, the question is what was the trial court's intent, which may be what is reflected in the reporter's transcript or may be what is reflected in the minute entry; if the trial court's intent can be discerned from the record, the appellate court will so determine; if the trial court's intent cannot be discerned from the record, the appellate court will remand to the trial court.

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶ 23 (Ct. App. 2009) (court stated that, when there is discrepancy between oral sentence and written judgment, oral pronouncement of sentence controls).

State v. Provenzano, 221 Ariz. 364, 212 P.3d 56, ¶¶ 22–26 (Ct. App. 2009) (because court could not tell from transcript, minute entry, and order of confinement whether trial court imposed concurrent or consecutive sentences, court remanded to trial court for it to state what it intended to impose, and if sentences were to be concurrent, give reasons for concurrent sentences).

31.8.a.050 The appellant has the duty to see that the record supports the claim on appeal; any matter not contained in the record is presumed to support the decision of the trial court.

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912, ¶¶ 7–9 (Ct. App. 2009) (defendant was charged with theft of means of transportation, and contended trial court erred when it refused to give her requested instruction on unlawful use of means of transportation; because record did not contain defendant’s requested instruction, court presumed trial court acted correctly).

31.8.h.020 If anything material to either party is omitted from the record or is misstated, the parties by stipulation, the trial court (either before or after the record is transmitted to the Appellate Court), or the Appellate Court on motion or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.

State v. Diaz, 2010 WL 476010, ¶ 18 (Feb. 12, 2010) (because transcript of polling of jurors contained names of only 11 jurors, appellate court issued opinion that defendant was deprived of right to have 12 jurors decide case, and thus reversed conviction and remanded; 3 days after court had issued its opinion, state’s appellate counsel called court reporter and asked her to check her notes and see if perhaps there had been error in transcribing polling of jurors; court reporter then filed “corrected transcript” showing 12 jurors had in fact delivered verdict; court of appeals held oral argument on matter, and state contended court should vacate its opinion and affirm conviction; court noted defendant raised in opening brief claim that only 11 jurors participated, and that state did nothing to attempt to correct record before court issued opinion, thus state’s attempt to correct record after court issued opinion was too late; on review, Arizona Supreme Court held that even uncorrected record taken as a whole failed to show that only 11 jurors participated, thus no error; court further stated that issue could have been resolved much earlier if state had followed procedure in Rule 31.8(h) to have record corrected).

Rule 31.9(d) Transmission of record—Transmission of Other Exhibits.

31.9.d.010 The court, or any party upon motion made to the appellate court, may request the transmission of exhibits not automatically transmitted under Rule 31.9(a) when such are necessary to the determination of the appeal.

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912, ¶ 8 (Ct. App. 2009) (defendant was charged with theft of means of transportation, and contended trial court erred when it refused to give her requested instruction on unlawful use of means of transportation; because record did not contain defendant’s requested instruction, court presumed trial court acted correctly and noted defendant had opportunity to add requested instruction to record on appeal but did not).

Rule 31.13(c) Appellate briefs—Contents.

31.13.c.010 The appellate brief must contain citations to the appropriate authority.

State v. Patterson, 222 Ariz. 574, 218 P.3d 1031, ¶¶ 7–21 (Ct. App. 2009) (court noted Arizona Court of Appeals is single court, and although it has division 1 and division 2, opinions are issued by three-judge panels; because court has no authority to sit “en banc,” it is incorrect to refer to opinion from court of appeals as “Division 1” opinion or “Division 2” opinion; court held there is no rule requiring that, when trial court is confronted with conflicting opinions issued by panel in division one and panel in division two, it must follow opinion from geographical area within which trial court is located; instead, trial court should follow opinion that trial court concludes is most persuasive).

Rule 32.1(a) Scope of remedy—Constitutional violation.

32.1.a.020 Even assuming that trial counsel was deficient in numerous aspects, including failure to comply with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, ABA Criminal Justice Defense Function Standards, and the Arizona Rules of Professional Conduct, this does not turn a claim of ineffective assistance of counsel into structural error, thus that claim must still be raised in a petition for post-conviction relief.

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶¶ 41–45 (2009) (defendant contended his trial counsel failed to assemble proper defense team, failed to investigate underlying facts of case, failed to communicate with him, and failed to represent him competently and diligently).

Rule 32.1(g) Scope of remedy—Significant change in the law.

32.1.g.010 A “significant change in the law” will occur when an appellate court overrules previously binding case law or when a statutory or constitutional amendment makes a definite break from prior case law, but does not occur when a case merely interprets a statutory or constitutional provision already in effect.

State v. Shrum, 220 Ariz. 115, 203 P.3d 1175, ¶¶ 15–23 (2009) (in 2003, defendant pled guilty and filed notice of post-conviction relief; defendant later moved to dismiss post-conviction relief proceedings, which trial court did; in 2008, defendant filed second petition for post-conviction relief based on 2007 case that had interpreted law in effect when defendant was sentenced; court stated appellate decision is not significant change in law merely because it was first to interpret statute, and held defendant was precluded from obtaining relief).

Rule 32.2(a) Preclusion of remedy—Preclusion.

32.2.a.040 A defendant may not obtain relief on any ground that defendant has waived in a previous collateral proceeding by not presenting that claim.

State v. Shrum, 220 Ariz. 115, 203 P.3d 1175, ¶¶ 7–14 (2009) (defendant pled guilty and filed notice of post-conviction relief; defendant later moved to dismiss post-conviction relief proceedings, which trial court did; 5 years later, defendant filed second petition for post-conviction relief; court held defendant was precluded from obtaining relief unless he could establish exception allowing successive petitions, which court held defendant did not do).

Rule 32.5 Contents of petition.

32.5.010 The defendant shall include every ground known to him or her for vacating, reducing, correcting, or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so.

State v. Shrum, 220 Ariz. 115, 203 P.3d 1175, ¶¶ 7–14 (2009) (defendant pled guilty and filed notice of post-conviction relief; defendant later moved to dismiss post-conviction relief proceedings, which trial court did; 5 years later, defendant filed second petition for post-conviction relief; court held defendant was precluded from obtaining relief unless he could establish exception allowing successive petitions, which court held defendant did not do).

32.5.020 Because Rule 32.5 required the petitioner to include in the petition every ground known to petitioner, and because Rule 32.6(d) provides that, after the petition is filed, no amendments shall be filed without leave of the court upon a showing of good cause, and because raising a new ground in a reply is essentially an amendment to the original petition, a trial court will not consider a new issue raised for the first time in a reply to the state's response.

State v. Lopez, 223 Ariz. 238, 221 P.3d 1052, ¶¶ 2–7 (Ct. App. 2009) (in his petition for post-conviction relief, defendant challenged assessment of attorney's fees; in his reply to state's response, he asserted additional claims of ineffective assistance of counsel; court held trial court correctly refused to consider defendant's ineffective assistance of counsel claims).

Rule 32.6(b) Additional pleadings; summary disposition; amendments—Defendant's reply.

32.6.b.010 Because Rule 32.5 required the petitioner to include in the petition every ground known to petitioner, and because Rule 32.6(d) provides that, after the petition is filed, no amendments shall be filed without leave of the court upon a showing of good cause, and because raising a new ground in a reply is essentially an amendment to the original petition, a trial court will not consider a new issue raised for the first time in a reply to the state's response.

State v. Lopez, 223 Ariz. 238, 221 P.3d 1052, ¶¶ 2–7 (Ct. App. 2009) (in his petition for post-conviction relief, defendant challenged assessment of attorney's fees; in his reply to state's response, he asserted additional claims of ineffective assistance of counsel; court held trial court correctly refused to consider defendant's ineffective assistance of counsel claims).

Rule 32.6(d) Additional pleadings; summary disposition; amendments—Amendment of pleadings.

32.6.d.010 Because Rule 32.5 required the petitioner to include in the petition every ground known to petitioner, and because Rule 32.6(d) provides that, after the petition is filed, no amendments shall be filed without leave of the court upon a showing of good cause, and because raising a new ground in a reply is essentially an amendment to the original petition, a trial court will not consider a new issue raised for the first time in a reply to the state's response.

State v. Lopez, 223 Ariz. 238, 221 P.3d 1052, ¶¶ 2–7 (Ct. App. 2009) (in his petition for post-conviction relief, defendant challenged assessment of attorney's fees; in his reply to state's response, he asserted additional claims of ineffective assistance of counsel; court held trial court correctly refused to consider defendant's ineffective assistance of counsel claims).

ARTICLE X. ADDITIONAL RULES.

SPECIAL ACTIONS.

Rule 1 Nature of the special action.

1.sa.020 Although the provisions for special actions do not contain a time limit within which a party must file a petition for special action, the court will consider the timeliness of the special action petition in determining whether to exercise its discretion and accept jurisdiction.

Cicoria v. Cole, 222 Ariz. 428, 215 P.3d 402, ¶¶ 4–8 (Ct. App. 2009) (defendant was convicted of extreme DUI in city court and appealed to superior court, which affirmed conviction and sentence; defendant filed special action petition 109 days later; court stated that, because only case it cited on issue of timeliness was 34 years old, and because defendant did not have benefit of court's views on timeliness issue, it would not hold tardiness of petition against defendant).

1.sa.047 If the superior court accepts jurisdiction of a special action from a lower court and addresses the merits of the claim, if a party then appeals the decision to the court of appeals, that court will also review the substantive merits.

Rogers v. Cota, 223 Ariz. 44, 219 P.3d 254, ¶¶ 3–4 (Ct. App. 2009) (petitioner was charged with extreme DUI; defendant filed motion to dismiss in municipal court contending that, because extreme DUI had mandatory minimum fine of \$1,000 plus 84% surcharge and three additional assessments totaling \$2,750, this exceeded municipal court's jurisdictional limit of \$2,500; municipal court denied motion to dismiss; petitioner filed special action, which superior court accepted but denied relief; when petitioner appealed to court of appeals, that court addressed merits of claim).

1.sa.100 Special action review is **available** when the party does not have an equally plain, speedy, and adequate remedy by appeal.

Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210, ¶ 4 (2009) (defendant filed motion to dismiss death penalty notice because trial court had made no finding of probable cause for aggravating circumstance (that defendant committed murder in cruel manner); trial court denied motion; because defendant had no equally plain, speedy, or adequate remedy by appeal from trial court's denial of motion, special action review was appropriate).

Trombi v. Donahoe, ___ Ariz. ___, 222 P.3d 284, ¶ 14 (Ct. App. 2009) (because petitioner had no right of appeal from trial court's sanction order, special action review was appropriate).

Alejandro v. Harrison, 223 Ariz. 21, 219 P.3d 231, ¶ 6 (Ct. App. 2009) (because defendant had no equally plain, speedy, or adequate remedy by appeal from trial court's refusal to accept his guilty plea to some, but not all, of the charges, special action review was appropriate).

State v. Bernini (Daughters-White), 222 Ariz. 607, 218 P.3d 1064, ¶ 3 (Ct. App. 2009) (because state had no equally plain, speedy, or adequate remedy by appeal from trial court's order that it produce software for Intoxilyzer 8000, special action review was appropriate).

State ex rel. Thomas v. Duncan, 222 Ariz. 448, 216 P.3d 1194, ¶ 6 (Ct. App. 2009) (because state had no equally plain, speedy, or adequate remedy by appeal from trial court's order limiting pre-screening examination to review of prior tests, special action review was appropriate).

Campbell v. Barton, 222 Ariz. 414, 215 P.3d 388, ¶¶ 5–6 (Ct. App. 2009) (because defendant had no equally plain, speedy, and adequate remedy by appeal from trial court's decision not to honor defendant's notice of change of judge, special action review was appropriate).

Carrillo v. Houser, 222 Ariz. 356, 214 P.3d 444, ¶ 5 (Ct. App. 2009) (defendant was convicted of DUI in municipal court and appealed to superior court; because defendant had no right of direct appeal to court of appeals, special action was only means to seek review by court of appeals).

State ex rel. Thomas v. Newell (Milegro), 221 Ariz. 112, 210 P.3d 1283, ¶ 5 (Ct. App. 2009) (because state had no equally plain, speedy, and adequate remedy by appeal from trial court's order to disclose scientific testing results, special action review was appropriate).

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶ 2 (Ct App. 2009) (because state had no equally plain, speedy, or adequate remedy by appeal from trial court's order that it could not use defendant's statements in case-in-chief, special action review was appropriate).

State v. Bernini (Daughters-White), 220 Ariz. 536, 207 P.3d 789, ¶ 6 (Ct. App. 2009) (DUI defendants requested source code for Intoxilyzer 8000; although trial court found that neither prosecutor nor any one controlled by prosecutor possessed source code, trial court nonetheless ordered prosecutor to obtain source code and give it to defendants; court accepted special action because state had no equally plain, speedy, or adequate remedy by appeal to challenge trial court's discovery order).

State v. Donahoe (Garibaldi-Osequera), 220 Ariz. 126, 203 P.3d 1186, ¶¶ 6–7 (Ct. App. 2009) (because trial court's ruling that it lacked authority to order defendant to disclose source of funds used to post bail was non-appealable interlocutory order, special action review was appropriate).

1.sa.125 Special action review is available to challenge the **ruling on a motion to remand or for a new finding of probable cause.**

Francis v. Sanders, 222 Ariz. 423, 215 P.3d 397, ¶ 9 (Ct. App. 2009) (grand jury indicted defendant for trafficking in stolen property; court noted that challenge to denial of motion for remand must be made by special action).

1.sa.150 Special action review is available to challenge the **ruling on a motion for change of venue or change of judge.**

Campbell v. Barton, 222 Ariz. 414, 215 P.3d 388, ¶¶ 5–6 (Ct. App. 2009) (because defendant had no equally plain, speedy, and adequate remedy by appeal from trial court's decision not to honor defendant's notice of change of judge, special action review was appropriate).

1.sa.155 Special action review is available to challenge a discovery request, question of confidentiality, or ruling that a privilege either did or did not apply.

Carondelet Health Network v. Miller, 221 Ariz. 614, 212 P.3d 952, ¶ 2 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time he had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain his name or contact information; court held that special action was appropriate means to challenge trial court's order that hospital disclose roommate's name so decedent's wife could interview him as witness).

State v. Bernini (Daughters-White), 220 Ariz. 536, 207 P.3d 789, ¶ 6 (Ct. App. 2009) (DUI defendants requested source code for Intoxilyzer 8000; although trial court found that neither prosecutor nor any one controlled by prosecutor possessed source code, trial court nonetheless ordered prosecutor to obtain source code and give it to defendants; court accepted special action because state had no equally plain, speedy, or adequate remedy by appeal to challenge trial court's discovery order).

1.sa.300 Special action is appropriate when the matter (1) involved only legal question and there are no factual issues, (2) was of first impression, (3) was of statewide importance, (4) was likely to recur, or (5) had received inconsistent decisions by different trial courts.

Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210, ¶ 4 (2009) (whether Rule 13.5(c) permits defendant in capital murder case to request determination of probable cause for alleged aggravating circumstances (3) was of statewide importance and (4) was likely to recur, thus special action review was appropriate).

State v. Noceo, 223 Ariz. 222, 221 P.3d 1036, ¶ 2 (Ct. App. 2009) (whether blood-draw evidence was constitutional (3) was of statewide importance and (5) had received inconsistent decisions by different trial courts, thus special action review was appropriate).

Alejandro v. Harrison, 223 Ariz. 21, 219 P.3d 231, ¶ 6 (Ct. App. 2009) (whether trial court could refuse to accept guilty plea to some, but not all, of the charges (1) involved only legal question, thus special action review was appropriate).

State v. Bernini (Daughters-White), 222 Ariz. 607, 218 P.3d 1064, ¶ 3 (Ct. App. 2009) (whether trial court had authority to order state to produce software for Intoxilyzer 8000 (3) was of statewide importance, thus special action review was appropriate).

State ex rel. Thomas v. Duncan, 222 Ariz. 448, 216 P.3d 1194, ¶ 6 (Ct. App. 2009) (whether trial court could limit pre-screening examination to review of prior tests (2) was of first impression and (4) was likely to recur, special action review was appropriate).

Campbell v. Barton, 222 Ariz. 414, 215 P.3d 388, ¶¶ 5-6 (Ct. App. 2009) (whether defendant who filed notice of change of judge before state filed notice that it was seeking death penalty may file second notice of change of judge after state filed notice that it was seeking death penalty (3) was of statewide importance and (4) was likely to recur, thus special action review was appropriate).

Carrillo v. Houser, 222 Ariz. 356, 214 P.3d 444, ¶ 5 (Ct. App. 2009) (question of what DUI suspect must do to expressly agree to BAC test (1) involved only legal question and (3) was of statewide importance, thus special action review was appropriate).

State ex rel. Thomas v. Newell (Milegro), 221 Ariz. 112, 210 P.3d 1283, ¶ 5 (Ct. App. 2009) (whether trial court could order state to disclose scientific testing results (4) was likely to recur, thus special action review was appropriate).

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶ 2 (Ct App. 2009) (whether state could use defendant's statements given in free talk after plea agreement (1) involved only legal question, and (3) was of statewide importance).

State v. Bernini (Daughters-White), 220 Ariz. 536, 207 P.3d 789, ¶ 6 (Ct. App. 2009) (whether trial court could order state to obtain and disclose to defendant information that it did not have in its possession (source code for Intoxilyzer 8000) (3) was of statewide importance).

State v. Donahoe (Garibaldi-Osequera), 220 Ariz. 126, 203 P.3d 1186, ¶¶ 6–7 (Ct. App. 2009) (whether trial court has authority to order defendant to disclose source of funds used to post bail (3) was of statewide importance, (4) was likely to recur, and (5) had received inconsistent decisions by different trial courts).

Rule 7(e) Special appellate court provisions—Contents of petition; supporting documents.

7.e.sa.030 All references to the record shall be supported by an appendix of documents in the record before the trial court that are necessary for a determination of the issues raised by the petition.

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶ 3 (Ct App. 2009) (defendant contended state did not provide court with documents necessary to resolve issues and thus court should decline to accept jurisdiction; court stated that record provided was sufficient, and that defendant had conceded any facts that might have been established by missing portions of record).

7.e.sa.040 The response to the petition shall, if necessary, be supported by an appendix of documents in the record before the trial court that are necessary for a determination of the issues raised by the petition which are not contained in the petitioner's appendix.

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶ 3 (Ct App. 2009) (defendant contended state did not provide court with documents necessary to resolve issues and thus court should decline to accept jurisdiction; court stated that, if defendant believed portions of record critical to issues he intended to raise were omitted, defendant should have provided court with those materials).

ARTICLE X. ADDITIONAL RULES.

RULES OF THE ARIZONA SUPREME COURT.

RULES OF PROFESSIONAL CONDUCT.

ER 1.1 Competence.

1.01.020 The state has a duty to appoint competent counsel to represent an indigent defendant, but the state has no right to supervise the attorney once appointed because such supervision would encroach upon both the defendant's Sixth Amendment right to counsel and the appointed attorney's ethical obligation to exercise independent judgment on behalf of the defendant.

State v. Hicks (Duman), 219 Ariz. 328, 198 P.3d 1200, ¶¶ 9–15 (2009) (State provided indigent defendant with counsel; after defendant was convicted, he filed petition for post-conviction relief: trial court granted new trial, and state subsequently dismissed all charges; defendant then sued state contending it was vicariously liable for counsel's negligent conduct; court held that; because state was precluded from supervising appointed counsel, state could not be vicariously liable for counsel's conduct).

ER 1.5(a) Fees—Reasonableness of fees.

1.05.a.030 A claim for attorney's fees shall be made in the pleadings, which are: the complaint; an answer; a counter-claim; a cross-claim; a third-party complaint; a third-party answer; and a reply; a party is not entitled to attorney's fees if the request is made in a motion.

King v. Titsworth, 221 Ariz. 597, 212 P.3d 935, ¶¶ 7–17 (Ct. App. 2009) (defendant filed answer *pro se*, and in that answer made no claim for attorney's fees; defendant subsequently retained counsel; after trial court decided on merits in defendant's favor, counsel filed motion asking for attorney's fees, and trial court awarded \$14,700; court held that, because defendant failed to make claim for attorney's fees in any pleading, trial court erred in awarding attorney's fees; court noted that defendant was not represented by counsel when he filed answer, and stated that counsel could have filed amended answer to assert claim for attorney's fees).

ER 1.15(a) Safekeeping Property.

1.15.a.010 A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 11–12 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer concluded attorney commingled and converted client funds; court held that attorney breached duties owed to client to maintain and safeguard their property).

ER 3.8(d) Special responsibilities of a prosecutor.

3.08.020 In prosecuting a capital case, the prosecutor is ethically bound not to allege any aggravating circumstance that the prosecutor knows is not supported by probable cause.

Chronis v. Steinle, 220 Ariz. 559, 208 P.3d 210, ¶ 19 (2009) (court held that Rule 13.5(c) permits defendant in capital murder case to request that trial court make finding whether there is probable cause to believe that aggravating circumstance exists).

Rule 60(a) Disciplinary sanctions—Types and forms of sanctions.

60.a.020 When an attorney causes injury or potential injury to a client, ABA Standard 4.12 provides that suspension is appropriate when an attorney knew or should have known that he or she was dealing improperly with a client's property; ABA Standard 4.13 provides that reprimand (which would include censure under Arizona's disciplinary procedures) is appropriate when an attorney was negligent in dealing with a client's property, but that suspension or even disbarment may be appropriate if the attorney was grossly negligent in failing to establish proper accounting procedures.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 20–22 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; because Hearing Officer found attorney acted negligently, censure was the appropriate sanction; court noted State Bar did not ask Hearing Officer to find that attorney acted with gross negligence).

60.a.030 In determining the appropriate sanction, the court should consider **four** factors, the first of which is the duty violated.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 11–12 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer concluded attorney commingled and converted client funds; court held attorney breached duties owed to client to maintain and safeguard their property).

60.a.040 In determining the appropriate sanction, the court should consider **four** factors, the second of which is the attorney's mental state.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 13–18 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer concluded attorney acted negligently, but Disciplinary Commission disagreed and concluded that attorney knew or should have known that her conduct was improper; court concluded there was reasonable basis for Hearing Officer to conclude attorney acted negligently, and concluded Disciplinary Commission should not have substituted its judgment for that of Hearing Officer).

60.a.050 In determining the appropriate sanction, the court should consider **four** factors, the third of which is the actual or potential injury caused by the misconduct.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶ 19 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer found attorney's actions caused actual harm to clients because she paid one client's debt with other client's funds and did not deposit sufficient personal funds to pay bank service fees; court held record supported Hearing Officer's findings).

60.a.060 In determining the appropriate sanction, the court should consider **four** factors, the **fourth** of which is the existence of aggravating and mitigating circumstances.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶ 23 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer found two aggravating circumstances (prior disciplinary action; refusal to acknowledge wrongful nature of conduct) and two mitigating circumstances (absence of dishonest or selfish motive; character and reputation); court agreed with Hearing Officer's conclusion that aggravating and mitigating circumstances did not alter presumptive sanction of censure).

60.a.070 Upon its review to determine whether the sanction was appropriate, the Arizona Supreme Court will consider similar cases to assess whether the sanction is proportional to the improper conduct.

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 24–26 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; attorney contended that other cases involving negligent trust account violations have resulted in censure combined with probation; State Bar did not disagree; court concluded appropriate sanction was censure combined with 2 years probation, which would include LOMAP, and State Bar's Trust Account Program and Trust Account Ethics Enhancement Program).

CODE OF JUDICIAL CONDUCT.

Rule 81, Canon 3(A): Judicial Duties in General.

81.c.3.a.010 A judge's judicial duties include all the duties of the judge's office prescribed by law.

In re Hillary C., 220 Ariz. 78, 210 P.3d 1249, ¶ 13 & n.7 (Ct App. 2009) (juvenile was adjudicated delinquent of driving while having alcohol in system; court held juvenile judge erred in concluding he had discretion whether to report violation to Department of Transportation; court noted A.R.S. § 28-1559(J) provides that failure, refusal, or neglect of judicial officer to comply with § 28-1559 is misconduct in office and grounds for removal from office; court stated that, given complexity and variety of statutes involved, and parties' failure to direct juvenile judge to relevant statutes, court did not find or suggest that juvenile judge committed any misconduct in erroneously failing to notify Department of Transportation of juvenile's adjudication).

Rules of the Commission on Judicial Conduct

Rule 6 Grounds for Discipline.

.010 The grounds for judicial discipline include willful misconduct in office, willful and persistent failure to perform judicial duties, habitual intemperance, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or a violation of the code.

In re Hillary C., 220 Ariz. 78, 210 P.3d 1249, ¶ 13 & n.7 (Ct App. 2009) (juvenile was adjudicated delinquent of driving while having alcohol in system; court held juvenile judge erred in concluding he had discretion whether to report violation to Department of Transportation; court noted A.R.S. § 28-1559(J) provides that failure, refusal, or neglect of judicial officer to comply with § 28-1559 is misconduct in office and grounds for removal from office; court stated that, given complexity and variety of statutes involved, and parties' failure to direct juvenile judge to relevant statutes, court did not find or suggest that juvenile judge committed any misconduct in erroneously failing to notify Department of Transportation of juvenile's adjudication).

March 3, 2010